Supreme Court, U. S.
FILED
JUN 2 1977
MICHAEL RODAK, JR., CLERK

THE SUPREME COURT OF THE UNITED STATES

OF AMERICA

ROBERT J. TRACY)

Appellant)

-vs-) CASE NO. 76-1811

STATE OF OHIO)

Appellee)

JURISDICTIONAL STATEMENT

ON APPEAL FROM FRANKLIN COUNTY, OHIO

COURT OF APPEALS

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Grounds Upon Which Jurisdiction of this Court is Invoked

This proceeding is an appeal of a criminal conviction which is brought to 28 U.S.C.A. section 1257.

The chronology of judgments below from which this appeal is taken is as follows:

a) The entry of the Ohio Supreme Court overruling Defendant-Appellant's motion for rehearing of denial for leave to appeal from the Franklin County Ohio Court of Appeals, dated 3/4/77-appearing at page A3 and A4 in the Appendix of this statement.

b) The entry and decision of the Ohio Supreme Court denying leave to appeal from the Franklin County Ohio Court of Appeals, dated 2/11/77-appearing at pages A5, A6, A7 and A8 in the appendix of this statement.

c) The entry and reported opinion of the Court of Appeals of Franklin County, Ohio dated October 14, 1976 sustaining the judgment and conviction of Defendant-Appellant in the Court of Common Pleas, Franklin County, Ohio-appearing at pages A9-A18 in the appendix of this statement.

d) the entry of the Court of Common Pleas of Franklin County, Ohio dated March 10, 1976, find finding Defendant-Appellant guilty and setting forth the sentence of the Court- appearing at pages A19, A20 and A21 in the appendix of this statement.

Notice of appeal was filed in the Ohio Supreme Court on April 22, 1977 from the nost recently dated judgment of the Court in this case, dated March 4, 1977 and listed in a) above - that notice appearing at page A1 and A2 in the appendix of this statement.

The statutory provision which is believed to confer jurisdiction of this appeal upon this Court is 28 U. S. C. A. section 1257 (2), set out as follows:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Cases which are believed to be in support of the jurisdiction of the United States Supreme Court are as follows:

Kelly v. Gilbert, U. S. District Ct. D. Mont., Billings Division, CV-76-108- BLG (1976); A. T. L. A. Law Reporter Volume 20 Number 2, p. 69.

Parker v. Gladden, 87 S. Ct. 468, 285 U.S. 363, 17 L. Ed. 2d. 420 (1966)

U.S. ex , rel Pascal v. Burke, 90 F. Supp 868 (1950).

Stroble v. State of Calif., 725. Ct. 599, 343 U.S. 181, 96 L. Ed. 872 (1952).

U.S. v. Pink, 62 S. Ct. 552, 315 U.S. 203 86L. Ed. 796 (1942).

Norris v. Alabama, 55 S. Ct. 579, 294 U.S. 587, 79 L. Ed. 1074 (1935)

Ohio Revised Code section 2907. 02 (D) is contained in the appendix not so much because of a challenge to the validity of that statute or section, but rather to illustrate for the Court that particular section of the law the application of which is challenged by Defendant-Appellant as having been capriciously and arbitrarily applied to him in violation of his constitutionally guaranteed rights of a fair trial, due process of the law and, most especially, equal protection under the law, being repugnant, thereby, to the Constitution of the United States.

FEDERAL QUESTIONS PRESENTED BY THIS APPEAL

1) Whether or not the prosecution, violated Defendant-Appellant's right to a fair trial, due process of the law, and equal protection of the law by its obtaining a series of continuances to appear before the grand jury in order to delay a hearing on the merits that act in order to utilize evidence of that alleged act prior to its dismissal against defendant in trial of a wholly independant act, here in question.

2) Whether or not the trial court violated defendant's constitutional rights to a fair trial, due process of the law, and equal protection under the law by its failure to sustain the defense objection to the introduction of evidence of an unindicted alleged prior act of defendant wholly independent of the one for which he was on trial.

3) Whether or not the trial court violated defendant's constitutional rights to a fair trial, due process under the law and equal protection of the law by its manner of application of the law which it had ruled applicable to the case by foreclosing defense use of evidence of the victim's past sexual activity, while still allowing use of evidence of defendant's alleged past sexual activity even without the ruling required by that very same law.

4) Whether or not the Ohio Supreme Court in its refusal to entertain Defendant-Appellant's motion for leave to appeal rehearing of denial of the motion, and the Franklin County Ohio Court of Appeals in its affirmance of the judgment of conviction of Defendant-Appellant's below violated Defendant-Appellant's constitutional rights to a fair trial, due process of the law and equal protection under the law.

5) Whether or not the trial court, and the various higher courts in upholding the verdict and judgment of the trial court, violated Defendant-Appellant's constitutional rights to a fair trial, due process of the law and equal protection of the law by allowing the verdict and judgment which is contrary to Ohio law and against the manifest weight of the evidence to stand over defense motions and objections.

6) Whether or not the trial court and the higher courts violated Defendant-Appellant's guaranteed rights to remain silent by the 5th Amendment to the U.S. Constitution and the right to effective (prepared) counsel as guaranteed by the 6th Amendment to the U.S. Constitution by allowing testimony and evidence in the prosecution's case-in-chief of another act wholly independent of the one for which Defendant was on trial.

STATEMENT OF THE CASE

Defendant-Appellant Robert Tracy was tried in December, 1975 before the jury on charges of aggravated burglary and rape as set forth in the indictment on page A26, A27 and A28 of the Apendix. He was found guilty, given a psychiatric examination per statute and sentenced to two four to twenty-five year concurrent terms. Defendant-Appellant duly filed notice of appeal.

During the prosecution's case-in-chief, evidence was presented over objection concerning Defendant-Appellant's alleged prior act of sexual activity with his daughter. This admission of evidence was assigned as error to the Court of Appeals. The Court of Appeals held it to be immaterial to the case (page A13, A14) but affirmed the conviction anyway. This evidence was permitted in direct contravention to the mandate

of Ohio Revised Code 2907.02 (D) which provides that "evidence of specific instances of the Defendant's sexual activity, opinion evidence of the Defendant's sexual activity and reputation evidence of the Defendant's sexual activity shall not be admitted under this Section unless it involves evidence of the origin of seman, pregnancy, or disease, the Defendant's past sexual activity with the victim or is admissible against the Defendant under Section 2907.02 (D) of the Revised Code, and only to the extent that the Court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value." No such ruling was ever made by the Trial Court.

Additionally, Ohio case law holds that "as a general rule, the introduction of evidence tending to show that a Defendant has committed another crime wholly inde-

pendent of the offense for which he is on trial is prohibited." State v. Hector, 190. St. 2d 167 (1969); State vs. Watson, 28 O. St. 2d 15 (1971); State v. Curry, 43 O. St. 2d 66 (1975); State v. Burson, 38 O. St. 2d 157 (1974); State v. Snowden, 49 O. App. 2d 7 (1976).

Relevancy and materiality are the two-pronged basis of admission of evidence of other acts in Ohio. Yet here where the evidence is held to be immaterial (page A13 and A14) by the Court of Appeals, it is still held admissible.

The Trial Court held specifically that the victim's prior sexual activity would not be admissible but made no ruling whatsoever as to Defendant's past sexual activity except to allow such evidence, over defense objections, even though the alleged prior act was unindicted at the time of admission into evidence.

Subsequently Defendant was found not guilty of that "sexual act" in a trial on the merits once indicted.

The alleged sexual activity occurred approximately one month prior to the act here in question. Defendant-Appellant was not, coincidentally, indicted on the first alleged act until the day following the guilty verdict with which we are here dealing! The prosecution, by obtaining five continuances to appear before the Grand Jury in order to prepare the case, manipulated that very Grand Jury system in violation of Defendant-Appellant's constitutional rights of due process and equal protection of the law. That is the same type of "oppressive exercise of authority denying Plaintiff (here, Defendant) his constitutional rights to due process of law," which gave rise to federal intervention in Kelly v. Gilbert (page4). It is on this basis that the Court should assume jurisdiction in our case also.

Defendant-Appellant attempted to raise this manipulation of the Grand Jury in argument before the Court of Appeals and in the memorandum submitted to the Ohio Supreme Court. Counsel was prepared to defend the rape charge and not an immaterial act which was not before the Court and did object to admission of evidence of that act. The prosecutorial manipulation only came to attention once the appeal was perfected and the manipulation was then attempted to be argued through the original objection. By this manipulation of the Grand Jury system the prosecution effectively denied Defendant effective counsel as guaranteed by the Sixth Amendment, and due process of law.

The Trial Court held that the Ohio Revised Code Section 2907. 02 effective on August 27, 1975 would be the applicable law for the offense which allegedly occurred on August 15, 1975., over defense objection. That fact and the uneven application of that law to victim and

Defendant were assigned as error through the Courts. Denial of acts of victim's past sexual activity while allowing evidence of the Defendant's past sexual activity violates Defendant's guaranteed constitutional rights to fair trial, due process of the law and equal protection of the law. The affirmance of a judgment which is contrary to law and against the manifest weight of the evidence violates these same fundamental rights; Defendant has assigned this as error throughout. Additionally, the prosecution introduced this evidence in its case-in-chief before Defendant had placed his character in question and while he was presumed to still be of good character. State v. Thorpe, 49 O. App. 2d 291. By so doing they effectively violated Defendant's Fifth Amendment right to remain silent by forcing him to take the stand to explain away this irrelevant act.

This continued series of violations of Defendant-

Appellant's constitutional rights to effective counsel, the right to remain silent, and the right to a fair trial, due process of the law and equal protection of the law are each, in and of themselves, substantial. However, when taken together, the panoply of encroachment warrants plenany consideration by this Court. Here, a man was falsely accused of having committed a crime by a woman, tried in a case where the prosecution's own physical evidence was in direct conflict with the alleged victim's statements, aided by the Trial Court's erroneous admission of an alleged unindicted prior act and made possible by prosecution's manipulation of the Grand Jury system in direct contravention of due process of the law.

Beyond the Court's erroneous admission of the alleged prior act evidence, the Court decided which law would be applicable to the case and then arbitrarily applied that law in violation of Defendant-Appellant's

constitutional rights. The Court of Appeals in their affirmation of the judgment and the Ohio Supreme Court in overruling defense motions to appeal and for rehearing merely compounded the detriment to Defendant's rights. Extraneous to the trial, the prosecution subverted a supposed safeguard provided to insure Defendant's right to due process of the law by manipulation the Grand Jury system.

For all of the above reasons, I respectfully request the United States Supreme Court to assume jurisdiction in this case and grant a plenary review by means of briefs on the merits and oral argument to resolve the constitutional questions involved.

APPENDIX

THE SUPREME COURT OF THE STATE OF

OHIO

THE STATE OF OHIO,	)	1977 TERM
	)	
CITY OF COLUMBUS.	)	To Wit: _____

State of Ohio	)	
Appellee	)	
-vs-	)	CASE NO. 76-1284
Robert J. Tracy	)	
Appellant	)	

NOTICE OF APPEAL

Appellant Robert J. Tracy appeals to the Supreme Court of the United States from the final judgment of this Court overruling the motion for leave to appeal from the Court of Appeals for Franklin County, Ohio on February 11, 1977, and its denial of rehearing of that motion on March 4, 1977, thereby upholding the Court of Appeals' affirmance of the judgment of con-

viction and sentence of the Franklin County, Ohio Court of Common Pleas of two concurrent four to twenty-five years in jail of the Appellant.

This appeal is taken pursuant to 28 U.S.C.A. section 1257. Appellant was convited of Aggravated Burglary under Ohio Revised Code section 2911.11 and Rape under Ohio Revised Code section 2907.02 and sentenced to concurrent four years to twenty-five years sentence on those conviction. Appellant at all times has claimed that judgment and conviction to be in violation of his rights under Ohio Constitution Article I section 10, Ohio House Bill #144 (Amended O.R.C. section 2907.02) and the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America.

George N. Gloeckner

George N. Gloeckner(GLO01)
Attorney for Defendant-Appellant
534 South Pearl Street
Columbus, Ohio 43215

FILED
APR 22 1977
Supreme Court of Ohio
Thomas L Startzman, Clerk

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,) 1977TERM
)
CITY OF COLUMBUS.) To Wit: March 4, 1977

State of Ohio,)
Appellee,)
)
vs.) No. 76-1284
)
Robert J. Tracy,) REHEARING
Appellant.)

It is ordered by the Court that rehearing in this case is denied.

FOR YOUR
INFORMATION
ONLY
NOT FOR FILING

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify

that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. _____ Page_____

In WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 4th day of March, 1977

Thomas L. Startzman Clerk.

By_____Deputy

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,	)	1977 TERM
	)	
CITY OF COLUMBUS.	)	To Wit: February 11, 1977

State of Ohio,	)	
Appellee,	)	No. 76-1284
	)	
vs.	)	MOTION FOR LEAVE TO
	)	APPEAL FROM THE
Robert J. Tracy,	)	COURT OF APPEALS
Appellant.	)	FOR FRANKLIN COUNTY

It is ordered by the Court that this motion is overruled.

FOR YOUR
INFORMATION
ONLY
NOT FOR FILING

COSTS:

Motion Fee, $20.00, paid by George N. Gloeckner

I, Thomas L. Startzman, Clerk of the Supreme

Court of Ohio, certifiy that the foregoing entry was correctly copied from the Journal of this Court.

this _____ day of _____ 19___

_____ Clerk

_____ Deputy

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,) 1977 TERM
)
CITY OF COLUMBUS.) To Wit: February 11, 1977

State of Ohio, Appellee,	)	
	)	No. 76-1284
vs.	)	
	)	APPEAL FROM THE
Robert J. Tracy, Appellant.	)	COURT OF APPEALS FOR FRANKLIN COUNTY

This cause, here on appeal as of right from the Court of Appeals for Franklin County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

FOR YOUR
INFORMATION
NOT
FOR FILING

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this _____ day of _____ 19____

_____ Clerk

_____ Deputy

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

State of Ohio, :

Plaintiff-Appellee :

v. : No. 76AP-198

Robert J. Tracy, :

Defendant-Appellant :

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on October 14, 1976, the assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

Whiteside, Reilly and McCormac, JJ.

By _____
Judge Alba L. Whiteside

cc: Alan C. Travis
George N. Gloeckner

Filed Court of Appeals
Franklin County 1976
OCT 15 A. M. 10:12
Thomas J. Enright-Clerk

IN THE COURT OF APPEALS OF FRANKLIN

COUNTY, OHIO

State of Ohio, :

Plaintiff-Appellee, :

v. : No. 76AP-198

Robert J. Tracy, :

Defendant-Appellant, :

DECISION

Rendered on October 14, 1976

Mr. George C. Smith, Prosecuting Attorney
Mr. David J. Graeff and
Mr. Allan C. Travis, Assistants
Franklin County Hall of Justice,
369 South High Street,
Columbus, Ohio ,
For Plaintiff-Appellee

Mr. George N. Gloeckner
534 South Pearl Street,
Columbus, Ohio,
For Defendant-Appellant

WHITESIDE, J.

Defendant appeals from his conviction in the Franklin County Court of Common Pleas of rape and aggravated burglary and raises seven assignments of error in support of his appeal, as follows:

"1. The trial court erred in its ruling that the case at hand should proceed under the auspices of Amended Substitute Senate Bill #144, the effective date of which was August 27, 1975, rather than proceeding under the law as it was in effect on August 17, 1975, the date of the alleged offense.

"2. The trial court erred when it allowed, over defense counsel's objections, the prosecution to present evidence and/or testimony of an unindicted prior alleged offense supposedly committed by Defendant, Robert Tracy, which evidence and/or testimony was, in reality inadmissible.

"3. The verdict and judgment are against the manifest weight of the evidence.

"4. The verdict and judgment are contrary to law.

"5. The trial court erred in overruling defense counsel's motion for a new trial.

"6. The trial court erred in overruling defense counsel's motion for acquittal on the basis that

the prosecution failed to carry its burden of proof beyond a reasonable doubt.

"7. The trial court erred in overruling defense counsel's motion for a judgment notwithstanding the verdict returned by the jury."

The victim of the alleged rape was residing with defendant's wife from whom he was separated. The victim had also resided with defendant and his wife prior to their separation, which had occurred shortly prior to the occurrence herein involved.

The victim testified that defendant broke into her bedroom and raped her, using a knife as a weapon. According to the victim's testimony, the motive for the rape was not the usual obvious motive but, rather was essentially one of revenge.

The victim testified that several weeks prior to the rape while she was living with defendant and his wife, at or shortly before the time of their separation, she called the police to report that defendant was

attempting to have his ten-year-old daughter engage in a sex act with him. As a result, defendant was arrested and indicted upon the charge.

Defendant testified on his own defense and denied any criminal involvment wither with the victim in this case or with his daughter. Defendant also presented an alibi defense.

By the first assignment of error, defendant contends that the trial court erred in applying R. C. 2907. 02 to this case since it took effect on August 27, 1975, ten days after the alleged offense herein involved.

R. C. 2907. 02(D) provides in pertinent part as follows:

"Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or

prejudicial nature does not outweigh its probative value."

There can be no error in the application of R. C. 2907. 02(D) to this case since it does not change the law. The section permits evidence of the victim's prior sexual activity "only to the extent that * * * the evidence is material to a fact at issue in the case." Quite clearly, evidence which is not material to a fact at issue in the case is not admissible regardless of the nature of the evidence. One of the classic bases for nonadmissibility of evidence is that it is immaterial.

The real import of R. C. 2907. 02 is to require by R. C. 2907. 02(E) a prior hearing in chambers upon the question of admissibility, that is whether evidence of prior sexual activity of the victim (or of the defendant) is material to an issue in the case. In

other word, the issue of materiality is to be determined out of the presence of the jury and ordinarily at least three days prior to trial. R. C. 2907. 02(E) expressly provides that the victim is entitled to representation by counsel during any hearing to resolve the admissibility of evidence. Defendant does not complain of application of R. C. 2907. 02(E) or (F) but, rather, of R. C. 2907. 02(D). Since R. C. 2907. 02 (D) merely restates the law as to admissibility of evidence and does not preclude the admission of any evidence that was previously admissible, there could be no error in the application of the section to this case.

In any event, it is quite clear that the evidence defendant wished to present was not material to any factual issue in this case. Defendant wished to present evidence that the victim had previously been raped

by an unknown assailant and reported this fact to the police. Obviously, such evidence would not be material to the issues in this case, having no bearing either upon the guilt of defendant or upon the credibility of the victim. Accordingly, the first assignement of error is not well taken.

By the second assignment of error, the defendant contends that the trial court erred in permitting some evidence with respect to the charge against the defendant with respect to the alleged sex act with his daughter.

Whether defendant was guilty or innocent of that act is immaterial to this case. However, the fact that the victim had reported the matter to the police and caused defendant to be indicted was material, bearing upon defendant's motive. While ordinarily the motive for rape is obvious, in this case, there was evidence of a motive of revenge. O.R.C. 2945.59

provides that, where the defendant's motive is an issue, "any acts of the defendant which tend to show his motive*** in doing the act in question may be proved." The objected-to evidence was admissible as bearing upon the defendant's motive in committing the act in question. The second assignment of error is not well taken.

The remaining five assignments of error are somewhat interrelated in that in all of them defendant contends there was insufficient evidence to support a finding of his guilt. None of these assignments of error are well taken. The testimony of the victim, if believed, was sufficient to sustain defendant's conviction.

Although there was a basis, strongly argued by defendant, to attack the credibility of the victim because of certain inconsistencies in the evidence and because of her friendship with defendant's estranged

wife, the manifest weight of the evidence supports the credibility of the victim. In any event, there is no basis for finding the verdict of the jury to be against the weight of the evidence or not to be supported by sufficient evidence. The evidence was ample, the jury believed the testimony of the victim, rather than that of defendant, which it was entitled to do.

For the foregoing reasons, all seven assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment Affirmed.

REILLY and McCORMAC, JJ., concur.

IN THE COURT OF COMMON PLEAS OF
FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO,	:	January Term, 1976.
Plaintiff,	:	Case No. 75DR-09-2113
vs	:	Indictment:Aggravated Burglary (2911.11R.C)
ROBERT J. TRACY,	:	(1 count) and Rape (2907.02R.C.) (1 count)
Defendant.	:	(Total 2 counts)

ENTRY

At a term of the Court of Common Pleas, begun and held at the Hall of Justice in Columbus, within and for the County of Franklin, and State of Ohio, on the 5th day of Jannuary, A.D., 1976.

This day March 10, 1976 again came the Prosecuting Attorney on behalf of the State of Ohio, the defendant being in Court in custody of the Sheriff and the Court being fully advised in the premises that the defendant was in Court and being represented by Counsel George N. Gloeckner.

Thereupon being informed of the verdict of the Jury, guilty as charged in the Indictment, Count One to wit, Aggravated Burglary, in violation of Section 2911.11 Revised Code and Count Two, to wit:Rape in violation of Section 2907.02 Revised Code, felonies of the first degree, and being inquired of, if he has anything to say why judgment should not be pronounced against him, and having nothing but what he has already said, it it the sentence of the Court that the defendant Robert Joseph Tracy pay the costs of this prosecution and the Jury fee for which execution is awarded, and be imprisoned in the Chillicothe Correctional Institute for a minimum term of four and a maximum term of twenty five on each count, sentences to run concurrent, or until discharge by law, Defendant to receive 200 days jail time credit. Defendant found not to be mentally ill nor mentally

retarded nor psychopatic offender and not committable to Department of Mental Health. Motions for New Trial, Acquittal, and Acquittal Notwithstanding Verdict overruled. Appeal bond set at $15,000.00 on rape charge and $10,000.00 on aggravated burglary-cash, surety or property.

Judge William Ammer
by assignment

Jury Fee $9750

IN THE COURT OF APPEALS OF OHIO TENTH

APPELLATE DISTRICT, FRANKLIN COUNTY

State of Ohio)

Plaintiff-Appellee)

-vs-) Case no. 76AP-198

Robert Tracy)

Defendant-Appellant)

NOTICE OF APPEAL

Notice is hereby given that Robert Tracy, Defendant-Appellant, appeals to the Supreme Court of Ohio, from the final judgment of the Court entered in this action on the 14th day of October, 1976, affirming Defendant-Appellant's conviction in case # 76CR-09-2113 Franklin County Court of Common Pleas, Columbus, Ohio. This case involves a substantial constitutional question.

George N. Gloeckner
(GLO01)
Attorney for Defendant-
Appellant
534 South High Street
Columbus, Ohio 43215

CERTIFICATE OF NOTICE

A copy of the foregoing notice was sent this 28th day of October, 1976 by ordinary mail to Office of the Franklin County Prosecutor at 369 South High Street, Columbus, Ohio 43215.

George N. Gloeckner
(GLO01)
Attorney for Defendant-
Appellant

IN THE FRANKLIN COUNTY COURT OF

COMMON PLEAS

State of Ohio	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	Case no. 75CR-09-2113
	:	
Robert Tracy	:	
	:	
Defendant-Appellant	:	

NOTICE OF APPEAL

Notice is hereby given that Robert Tracy, Defendant, appeals to the Court of Appeals of Franklin County, Ohio, 10th Appellate Deistrict, from the judgment of the court entered in this action on the 10th day of March, 1976.

George N. Gloeckner
(GLO01)
Attorney for Defendant-Appellant

SERVICE OF COPY

A copy of the foregoing notice was delivered this

10th day of March, 1976, at the office of the County Prosecutor for Franklin County, Ohio, 369 South High Street, Columbus, Ohio.

George N. Gloeckner
Attorney at Law

Case no. 75CR-09-2113

THE STATE OF OHIO)
) INDICTMENT FOR
FRANKLIN COUNTY, ss.) Aggravated Burglary
(2911.11R.C.) (1 count)&
Rape (2907.02R.C.)
(1 Count) (Total 2 counts)

In the Court of Common Pleas, Franklin County Ohio, of the Grand Jury Term beginning June 13 in the year of our Lord, one thousand nine hundred and seventy five.

First Count

The Jurors of the Grand Jury of the State of Ohio, duly selected, impaneled, sworn, and charged to inquire of crimes and offenses committed within the body of Franklin County, in the State of Ohio, in the name and aby the authority of the State of Ohio, upon their oath do find and present that

Robert J. Tracy

late of said County, on or about the 15th day of August in the year of our Lord, one thousand nine hundred and seventy five within the County of Franklin

aforesaid, in violation of Section 2911.11 R.C., did, by force, stealth or deception, trespass in 2208 Albert Avenue, an occupied structure, as defined in Section 2909.01 of the Revised Code, or a separately secured or separately occupied portion thereof, with purpose to commit therein, a theft offense as defined in Section 2913.01 of the Revised Code, or a felony, and said occupied structure is the permanent or temporary habitation of Jacqueline Timson, in which, at the time, said Jacqueline Timson was present or likely to be present,

Second Count

And the Grand Jurors aforesaid, upon their oath, do further find and present that Robert J. Tracy on or about the 15th day of August , 1975, within the County of Franklin aforesaid, in violation of Section 2907.02 R.C., did engage in sexual conduct with Jacqueline Timson, not his spouse, the said Robert

J. Tracy having purposely compelled Jacqueline Timson, to submit by force or threat of force.

(Amended Substitute Senate Bill No. 144)

AN ACT

To amend sections 2907.01, 2907.02, 2907.05 and 2951.02, and to enact sections 2907.10, 2907.11, 2907.12, 2907.28, and 2907.29 of the Revised Code to provide protection for victims of sexual assaults, and to declare an emergency.

Be it enacted by the General Assembly of the State of Ohio:

Section 1. That sections 2907.01, 2907.02, 2907.05, and 2951.02 be amended, and sections 2907.10, 2907.11, 2907.12, 2907.28, and 2907.29 of the Revised Code be enacted to read as follows:

Sec. 2907.01. As used in sections 2907.01 to 2907.37 of the Revised Code:

(A) "Sexual conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

Sec. 2907.02. (A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

(1) The offender purposely compels the other person to submit by force or threat of force.

(2) For the purpose of preventing resistance, the offender substanially impairs the other person's judgment or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.

(3) The other person is less than thirteen years of age, whether or not the offender knows the age of such person.

(B) whoever violates this section is guilty of rape, a felony of the first degree. If the offender under division (A) (3) of this section purposely compels the victim to submit by force or threat of force, whoever violates division (A) (3) of this section shall be imprisoned for life.

(C) A VICTIM NEED NOT PROVE PHYSICAL RESISTANCE TO THE OFFENDER IN PROSECUTIONS UNDER THIS SECTION.

(D) EVIDENCE OF SPECIFIC INSTANCES OF THE VICTIM'S SEXUAL ACTIVITY, OPINION EVIDENCE OF THE VICTIM'S SEXUAL ACTIVITY, AND REPUTATION EVIDENCE OF THE VICTIM'S SEXUAL ACTIVITY SHALL NOT BE ADMITTED UNDER THIS SECTION, UNLESS IT INVOLVES EVIDENCE OF THE ORIGIN OF SEMEN, PREGNANCY, OR DISEASE, OR THE VICTIM'S PAST SEXUAL ACTIVITY WITH THE OFFENDER, AND ONLY TO THE EXTENT THAT THE COURT FINDS THAT THE EVIDENCE IS MATERIAL TO A FACT AT ISSUE IN THE CASE AND THAT ITS INFLAMMATORY OR PREJUDICIAL NATURE DOES NOT OUTWEIGH ITS PROBATIVE VALUE.

EVIDENCE OF SPECIFIC INSTANCES OR THE DEFENDANT'S SEXUAL ACTIVITY, OPINION EVIDENCE OF THE DEFENDANT'S SEXUAL ACTIVITY, AND REPUTATION EVIDENCE OF THE DEFENDANT'S SEXUAL ACTIVITY SHALL NOT BE ADMITTED UNDER THIS SECTION UNLESS IT INVOLVES EVIDENCE OF THE ORIGIN OF SEMAN, PREGNANCY, OR DISEASE, THE DEFENDANT'S PAST SEXUAL ACTIVITY WITH THE VICTIM, OR IS ADMISSABLE AGAINST THE DEFENDANT UNDER SECTION2945.59 OF THE REVISED CODE, AND ONLY TO THE EXTENT THAT THE COURT FINDS THAT THE EVIDENCE IS MATERIAL TO A FACT AT ISSUE IN THE CASE AND THAT ITS INFLAMMATORY OR PREJUDICIAL NATURE DOES NOT OUTWEIGH ITS PROBATIVE VALUE.

(E) PRIOR TO TAKING TESTIMONY OR RECEIVING EVIDENCE OF ANY SEXUAL ACTIVITY OF THE VICTIM OR THE DEFENDANT IN A PROCEEDING UNDER THIS SECTION, THE COURT SHALL RESOLVE THE ADMISSIBILITY OF THE PROPOSED EVIDENCE IN A HEARING IN CHAMBERS, WHICH SHALL BE HELD AT OR BEFORE PRELIMINARY HEARING AND NOT LESS THAN THREE DAYS BEFORE TRIAL, OR FOR GOOD CAUSE SHOWN DURING THE TRIAL.

(F) UPON APPROVAL BY THE COURT, THE

VICTIM MAY BE REPRESENTED BY COUNSEL IN ANY HEARING IN CHAMBER OR OTHER PROCEEDING TO RESOLVE THE ADMISSIBILITY OF EVIDENCE, IF THE VICTIM IS INDIGENT OR OTHERWISE UNABLE TO OBTAIN THE SERVICES OF COUNSEL, THE COURT MAY, UPON REQUEST, APPOINT COUNSEL TO REPRESENT THE VICTIM WITHOUT COST TO THE VICTIM.

SERVICE OF COPY

A copy of the foregoing jurisdictional statement was sent this 15th day of June, 1977 by ordinary mail to the Franklin County Prosecutor at the Franklin County Hall of Justice, 369 South High Street, Columbus, Ohio 43215.

George N. Gloeckner

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Supreme Court, U. S.
FILED
JUL 20 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1811

ROBERT J. TRACY,

Appellant,

-vs-

STATE OF OHIO,

Appellee.

ON APPEAL FROM THE
TENTH DISTRICT COURT OF APPEALS
FRANKLIN COUNTY, OHIO

MOTION TO DISMISS

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BRIEF IN SUPPORT OF MOTION

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A STATE STATUTE REGULATING THE ADMISSIBILITY OF EVIDENCE OF OTHER ACTS OF A DEFENDANT AS BEARING UPON PROOF OF MOTIVE OR INTENT VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

II. WHETHER A STATE MAY ENACT LAWS GOVERNING THE ADMISSIBILITY OF EVIDENCE ON THE BASIS OF MATERIALITY AND RELEVANCY WITHOUT VIOLATING THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment Fourteen, United States Constitution
Section 2945.59, Ohio Revised Code
Section 2907.02, Ohio Revised Code
(Set forth in Appendix, pages 7, 9)

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1811

ROBERT J. TRACY,
Appellant,

-vs-

STATE OF OHIO,
Appellee.

ON APPEAL FROM THE TENTH DISTRICT COURT OF APPEALS FRANKLIN COUNTY, OHIO

MOTION TO DISMISS

Pursuant to Rule 16 of the Rules of this Court, Appellee, the State of Ohio, moves the Court to dismiss the within appeal as not presenting a substantial federal question as well as upon the grounds that the question sought to be reviewed was not timely nor properly raised and was not expressly passed on by the court below.

BRIEF IN SUPPORT OF MOTION

STATEMENT OF THE CASE

Appellant was indicted September 23, 1975, on charges of rape and aggravated burglary. The offense occurred on August 15, 1975. Trial date was set for November 5, 1975, but continued at appellant's request. On December 8 and 9, 1975, appellant was tried before a jury which returned guilty verdicts on both counts.

The victim, who knew the appellant, testified that she was awaked in her bedroom by appellant who threatened her with a knife and then raped her. The appellant stated to the victim ". . . that if he was going to jail on what he had done to his daughter, that he was going to do it to me, too." The victim had previously reported appellant to police after overhearing appellant ask his daughter to perform an oral sex act with appellant.

Police officers were called to the scene. The victim was visably shaken. A knife found in the bedroom was admitted in evidence. Following a physical examination of the victim, semen was found to be present. Entry to the home was made by removing a screen on a downstairs window. Muddy tracks led from the entry point to the victim's bedroom.

On appeal, the conviction was affirmed by unanimous panel in the Tenth District Court of Appeals of Ohio. Further review was denied by the Ohio Supreme Court and appellant now seeks review by this Court.

ARGUMENT

I. Appellant seeks to invoke the jurisdiction of the Supreme Court as provided in Title 28, United States Code, Section 1257(2). We note in response that at no stage of the proceedings below was the constitutionality of Section 2907.02, Ohio Revised Code, drawn in question. The ruling of the Tenth District Court of Appeals of Ohio (set forth in appellant's jurisdictional statement at page A-10) passed only on those questions raised and did not pass upon the constitutionality of that statute. Additionally, no substantial federal question was presented below or in the within appeal.

As stated by the Court of Appeals below, the amend-

ment of Section 2907.02, Ohio Revised Code, did not change the law of Ohio, with respect to admissibility of evidence: ". . . evidence which is not material to a fact at issue in the case is not admissible regardless of the nature of the evidence." (Appellant's brief, appendix, page A-14)

It is important to note the difference between the evidence appellant sought to introduce regarding the victim, and evidence regarding appellant's prior act introduced under an entirely different statute: Section 2945.59, Ohio Revised Code. As stated by the Court of Appeals of Ohio, "[d]efendant wished to present evidence that the victim had previously been raped by an unknown assailant and reported this fact to police. Obviously, such evidence would not be material to the issues in this case, having no bearing either upon the guilt of the defendant or upon the credibility of the victim." (Appellant's appendix, page A-16)

Immediately thereafter, the court below reviewed the separate and distinct issue of admissibility of evidence of the reporting of appellant's prior act or conduct, as bearing upon the issue of motive. It was on that issue that the court stated that guilt or innocence of the other act was immaterial to the issue of the case. The fact that the victim had *reported* the incident to police was held material as bearing upon motive; citing Section 2945.59, Ohio Revised Code. (Appendix, page 9)

It has long been established that the courts have broad latitude in admitting evidence tending to establish a defendant's motive for committing a particular offense. *Moore v. Texas* (1893), 150 U.S. 57 at 61. See *Lisenba v. California* (1941), 314 U.S. 219 at

227; *Nye & Nissen v. United States* (1949), 336 U.S. 613; *Anderson v. Maryland* (1976), ... U.S. ..., 96 S. Ct. 2737; *United States v. Baumgarden*, (C.A. 8th, 1975), 517 F. 2d 1020, cert. denied, ... U.S. ..., 96 S. Ct. 152.

The admissibility of evidence under that well-recognized rule, (codified in Ohio as Section 2945.59, Revised Code), has been described as ". . . a concededly non-constitutional issue of the admissibility of certain evidence under a state statute." *Klein v. Cardwell* (C.A. 6, 1971), 448 F. 2d 407, 408. A comparable provision for admissibility of such evidence is contained in Rule 404(B) of the Federal Rules of Evidence.

Appellant's subsequent acquittal on the charges regarding his daughter does not render such evidence inadmissible in the within prosecution. There need be no prosecution, much less conviction, before such evidence, if relevant and material, is admissible in a criminal case. Even prior acquittal of the similar offense sought to be proved does not preclude admissibility of that evidence in a subsequent prosecution. *United States v. Addington* (C.A. 10, 1973), 471 F. 2d 560; *Hernandez v. United States* (C.A. 9, 1966), 370 F. 2d 171; *United States v. Castro-Castro* (C.A. 9, 1972), 464 F. 2d 336, cert. denied 410 U.S. 916; c.f. *United States v. Woods* (C.A. 4, 1973), 484 F. 2d 127, cert. denied 415 U.S. 979. There is no issue of collateral estoppel as in *Ashe v. Swenson* (1970), 397 U.S. 436.

CONCLUSION

It is respectfully submitted that the within appeal has been improvidently taken under Title 28 United States Code, Section 1257(2), and that therefore, this Court lacks jurisdiction. The constitutionality of the statutes of Ohio has not been drawn in question and the ruling below did not pass on that issue. Appellant does not suggest that the statutes are constitutionally infirm.

The judgment of the Court of Appeals of Ohio, Tenth Appellate District, rests on adequate state grounds and presents no federal question of substance. The appeal, therefore, should be dismissed.

Reviewing the appeal as a petition for a writ of certiorari pursuant to Title 28, United States Code, Section 2103, it is respectfully submitted that in light of the decisions of this Court and those courts of the several jurisdictions cited within, that the writ of certiorari should not issue.

Respectfully submitted,

GEORGE C. SMITH
Prosecuting Attorney

ALAN C. TRAVIS
Assistant Prosecuting Attorney
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614/462-3555

CERTIFICATE OF SERVICE

Pursuant to Rule 33(3)(b) of the Rules of Practice of the Supreme Court, the undersigned, a member of the bar of the Supreme Court of the United States, hereby certifies that three (3) copies of the foregoing

motion to dismiss were served upon George B. Gloeckner, 534 South Pearl Street, Columbus, Ohio 43215; counsel for appellant, this ... day of July, 1977 and that all parties required to be served have been served.

ALAN C. TRAVIS
Assistant Prosecuting Attorney
Counsel for Appellee

APPENDIX

SECTION 2907.02, OHIO REVISED CODE

(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

(1) The offender purposely compels the other person to submit by force or threat of force.

(2) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.

(3) The other person is less than thirteen years of age, whether or not the offender knows the age of such person.

(B) Whoever violates this section is guilty of rape, a felony of the first degree. If the offender under division (A)(3) of this section purposely compels the victim to submit by force or threat of force, whoever violates division (A)(3) of this section shall be imprisoned for life.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise unable to obtain the services of counsel, the court may, upon request, appoint counsel to represent the victim without cost to the victim.

APPENDIX

SECTION 2945.59, OHIO REVISED CODE

In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.